(22,450.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 829.

JOHN C. MACKAY

vs.

UINTA DEVELOPMENT COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print
Certificate of the United States circuit court of appeals for the eighth circuit	1	1
Statement of case	1	1
Questions certified	4	2
Judge's certificate	5	3
Clerk's certificate	6	3

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 9, 1911.

1 United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1910.

No. 3411.

JOHN C. MACKAY, Plaintiff in Error,
v.
UINTA DEVELOPMENT COMPANY, Defendant in Error.

The United States Circuit Court of Appeals for the Eighth Circuit certifies that the record in the above entitled cause, now pending in such court upon a writ of error to the Circuit Court of the United States for the District of Wyoming, discloses the following:

December 10, 1908, the Uinta Development Company, a corporation organized and existing under the laws of the State of Wyoming, commenced in the District Court for the County of Sweetwater in that State an action at law against John C. Mackay, a resident and citizen of the State of Utah, to recover damages for an unlawful trespass alleged to have been committed by Mackay upon lands of the Development Company in said County of Sweetwater. January 8, 1909, Mackay appeared in the cause and answered the Development Company's petition. March 2, 1909, by permission of the court, the Development Company filed in the cause an amended petition, which merely reiterated with greater fullness of statement, the cause of action set forth in the original petition. March 29, 1909,
2 Mackay answered the amended petition, and on May 3, 1909, by permission of the court, filed in the cause an amended answer putting in issue many of the material allegations of the amended petition and also setting up a counterclaim in the nature of a claim at law for damages. The Development Company's claim, upon which judgment was sought against Mackay in both the original and amended petitions, amounted to $1950.00, exclusive of interest and costs; and Mackay's counterclaim, upon which judgment was sought against the Development Company, amounted to $3000.00, exclusive of interest and costs. These claims were of such a nature and were so related one to the other that, under the statutes of Wyoming, either could be interposed as a counterclaim to the other. They also, under those statutes, could be litigated and determined in separate actions, subject only to the limitation that, in the courts of the State, a defendant who omits to set up in his answer an existing counterclaim and subsequently makes it the subject of a separate action cannot recover costs in the subsequent action.

Neither the original nor the amended petition of the Development Company presented, upon its face, any Federal question, and the original answers of Mackay merely put in issue the material allegations of those petitions, but in his amended answer Mackay grounded his defense to the Development Company's claim and also his counterclaim against that company, upon certain enumerated statutes of the United States.

At the time of filing his amended answer with the counterclaim, which was after the expiration of the time within which he was required by the laws of the State to answer or plead to the original petition, Mackay, without objection on the part of the Development Company, sought and obtained in the State court an order removing the cause to the Circuit Court of the United States for the District of Wyoming. This order was sought and was granted upon the theory that the parties were citizens of different states as before indicated, that the construction of Federal statutes necessarily was involved in the determination of the controversy, and that the amount in dispute, as disclosed by the amended answer and counterclaim, exceeded $2000.00, exclusive of interest and costs.

3 Thereafter a transcript of the pleadings and proceedings in the State Court was filed in the Circuit Court of the United States for the District of Wyoming, and both parties appeared in the latter court and there prosecuted the cause to a final judgment upon the merits. After the removal no change was made in the pleadings save as the Development Company filed a reply putting in issue many of the material allegations in Mackay's amended answer, including the counterclaim; and after the removal the parties continued to be designated as before, that is, the Development Company as plaintiff and Mackay as defendant. At no time in the course of the proceedings in the circuit court did either party call in question the removal or the jurisdiction of that court, but on the contrary both parties submitted themselves and their claims to its jurisdiction, so far as they could, and sought its decision of the controversy presented by the pleadings. The cause was tried to the court, without a jury, pursuant to a written stipulation filed with the clerk, wherein the parties agreed so to try the cause; and the finding and judgment were in favor of the Development Company. This writ of error was sued out by Mackay and his assignments of error call in question several rulings made in the course of the trial, but neither party in anywise questions the power of the Circuit Court to try and determine the cause in the circumstances here recited.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law arise upon the record in the cause and that their decision is necessary to its proper disposition, and to the end that the cause rightly may be disposed of such court desires the instruction of the Supreme Court of the United States upon those questions, to wit:

4 1. May a defendant in an action in a State Court brought by a citizen of the State against a citizen of another State for less than $2000, exclusive of interest and costs, who has appeared and answered the plaintiff's petition, thereafter lawfully remove the cause to the Circuit Court of the United States upon filing in the State Court, by its leave, an amended answer and a counterclaim for more than $2000, exclusive of interest and costs, when under the State practice he might maintain a separate action on his counterclaim, though under such practice he could not recover costs in such separate action?

2. Assuming that it was optional with Mackay to set up his counterclaim, as was done, or to withhold it and subsequently to make it the subject of a separate action, and that a choice of the latter alternative could not result in the loss of any right, save that if the subsequent action were in a court of the State he could not recover costs therein, Was Mackay so far a plaintiff as respects the counterclaim that it must be disregarded in determining whether or not under the removal statute the cause properly could be removed into the Circuit Court at his instance?

3. Assuming, as respects the counterclaim, that Mackay was a plaintiff and not a defendant, Is the provision of the removal statute, which designates the defendant as the party who may obtain a removal when the suit is one between citizens of different states, or is one arising under the laws of the United States, restrictive and jurisdictional in the sense that the Circuit Court acquires no jurisdiction whatever through such a removal unless it be by the defendant, or is the provision only modal and formal in the sense that nonconformity thereto may be waived?

4. Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as
5 respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counterclaim and thereby have enabled the court to take cognizance thereof, Did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counterclaim in that action?

WILLIS VAN DEVANTER,
WILLIAM C. HOOK,
JOHN E. CARLAND,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

6 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of John C. Mackay, Plaintiff in Error, vs. Uinta Development Company, No. 3411, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this fifth day of December, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

7 [Endorsed:] Original. U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1910. No. 3411. John C. Mackay, Plaintiff in Error, vs. Uinta Development Company. Certificate of Questions to Supreme Court of the United States. Filed Dec. 5, 1910. John D. Jordan, clerk.

Endorsed on cover: File No. 22,450. U. S. Circuit Court Appeals, 8th Circuit. Term No. 829. John C. Mackay vs. Uinta Development Company. (Certificate.) Filed December 20th, 1910. File No. 22,450.

No. [illegible] 190.

PETITION

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

[illegible]

[illegible]
FILED
MAR [illegible] 19[illegible]
JAMES [illegible] McKENNEY
[illegible]

JOHN C. MACKAY

vs.

UINTA DEVELOPMENT COMPANY

PETITION FOR THE WHOLE RECORD AND CAUSE TO BE SENT UP TO THE COURT FOR ITS CONSIDERATION.

HIRAM [illegible] BOOTH,
BARNARD J. STEWART,
Attorneys for Petitioner.

([illegible])

(22,450.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 829.

JOHN C. MACKAY

vs.

UINTA DEVELOPMENT COMPANY

PETITION FOR THE WHOLE RECORD AND CAUSE TO BE SENT UP TO THE COURT FOR ITS CONSIDERATION.

INDEX.

Petition for the whole record and cause to be sent up to the court for its consideration - - - - - - -	Page 1

October Term, 1910.

No. 829.

JOHN C. MACKAY,

v.

UINTA DEVELOPMENT COMPANY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John C. Mackay, respectfully shows:

That the Circuit Court of Appeals for the Eighth Circuit caused to be filed in this court, on the 20th day of December, 1910, a certificate in the above entitled cause, wherein said Court certified to this Court certain questions of law pertaining to jurisdiction, the determination of which was necessary to the proper disposition of this cause, and sought the instructions of the Supreme Court of the United States upon those questions.

Your petitioner respectfully represents that he desires that the whole record and cause may be sent up to this Court for its consideration, that not only the questions of jurisdiction, set forth in said certificate, might be determined, but that the cause herein might be heard and disposed of upon its merits, and your petitioner respectfully represents that a proper determination of the questions so certified requires an examination, as your petitioner varily believes, of the whole of said record, and petitioner herewith presents this Court with a certified copy of said record.

WHEREFORE your petitioner respectfully prays that the whole of said record and cause may be sent up to this Court for its consideration, to the end that said cause may be reviewed and determined by this Court, and for such other and further order as in the premises to this Court may seem appropriate.

Dated this 14th day of February, 1912.

JOHN C. MACKAY.
By HIRAM E. BOOTH,
BARNARD J. STEWART,
His Attorneys.

State of Utah }
County of Salt Lake. } ss.

Barnard J. Stewart being first duly sworn, says: That he is one of the counsel for John C. Mackay, plaintiff in error; that he prepared the foregoing petition and that the allegations therein are true, as he verily believes.

BARNARD J. STEWART.

Subscribed and sworn to before me by Barnard J. Stewart this 14th day of February, 1912.

(Seal.) DANIEL ALEXANDER,
Notary Public.

—IN THE—

Supreme Court of the United States

October Term, 1912.

No. 199.

JOHN C. MACKAY

vs.

UINTA DEVELOPMENT CO.

BRIEF OF JOHN C. MACKAY, PLAINTIFF IN ERROR, ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BARNARD J. STEWART,
CHARLES H. STEWART,
Attorneys for Plaintiff in Error.

SAMUEL W. STEWART,
DANIEL ALEXANDER,
Of Counsel.

INDEX.

Page.

STATEMENT 1-6
Facts Certified by U. S. Cir. Ct. App. for Eighth Circuit.. 1-4
Questions Certified by U. S. Cir, Ct. App. for Eighth Circuit 4-6

ARGUMENT 6-41
Question One 6-27
Propositions A and B. 6-7
Discussion and Authorities on Prop. A..... 8-11
Discusison and Authorities on Prop. B..... 11-27
Question Two 27-35
Question Three 35-38
Question Four 38-41

CASES CITED.

Act Mar. 3, 1887, 24 St. at L. 552, Chap. 373, as corrected by by Act. Aug. 13, 1888, 25 St. at L. 433, Ch. 866..... 7-8
Ayers v. Watson, 113 U. S. 594, 597, 599, (28:1093-1095) 9-11
Block v. Darling, 140 U. S. 234.....11, 13, 14
Bennett v. Devine, (C. C.) 45 Fed. Rep. 705..... 23
Connell v. Smiley, 151 U. S. 335 (39:443) 9
Carson & Rand Lum. Co. v. Holtzclaw, 39 Fed. Rep. 578, 12, 21, 26, 31, 36
Clarkson v. Manson, (C. C.) 4 Fed. Rep. 257.....12, 18
Falls Wire Mfg. Co. v. Broderick (C. C.) 6 Fed Rep. 654..... 23
Lavell v. Cragin, 136 U. S. 130.....11, 12, 13
Lee v. Ins. Co., (C. C.) 74 Fed. Rep. 424.....12, 16, 17
LaMontagne v. T. W. Harvey Lum. Co., (C. C.) 44 Fed Rep. 645. .....23, 24, 25, 28, 30
Martin v. Baltimore & Ohio Ry Co., 151 U. S. 673, 691, (38:311, 317, 318). 9
McKown v. Kas. & T. Coal Co., 105 Fed. Rep. 657.....23, 24, 30, 37
Northern Pac. Rd. Co. v. Austin, 135 U. S. 315, 318 (34:219) 9
Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 91.....18, 20, 40
Price & Hart v. T. J. Ellis & Co., 129 Fed. Rep. 482..... 36
Revised Codes of Idaho, Secs. 3543, 3544, 3545, 3546.....14, 16, 28
Waco Hdw. Co. v. Mich. Stove Co., 91 Fed. Rep. 289, 33 (C. C. A.) 511 ..... 26, 37
West v. Aurora City, 6 Wallace 139, 18 L. Ed. 819..... 26, 37
Walcott v. Watson, (C. C.) 46 Fed. Rep. 529.....26,30, 31

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 190.

JOHN C. MACKAY

vs.

UINTA DEVELOPMENT CO.

BRIEF OF JOHN C. MACKAY, PLAINTIFF IN ERROR, ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT.

This case is before this court on a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, wherein said Court certifies that there are certain questions of law arising upon the record in the case, upon which the decision of the Supreme Court of the United States is thought to be necessary to its proper disposition, and to the end that the cause may rightfully be disposed of by said Court the following facts are certified to this court, by the Circuit Court of Appeals for the Eighth Circuit.

December 10, 1908, the Uinta Development Company, a corporation organized and existing under the laws of the State of Wyoming, commenced in the District Court for the County of Sweetwater

in that State an action at law against John C. Mackay, a resident and citizen of the State of Utah, to recover damages for an unlawful trespass alleged to have been committed by Mackay upon lands of the Development Company in said County of Sweetwater. January 8, 1909, Mackay appeared in the cause and answered the Development Company's petition. March 2, 1909, by permission of the Court, the Development Company filed in the cause an amended petition, which merely reiterated with greater fullness of statement the cause of action set forth in the original petition. March 29, 1909, Mackay answered the amended petition, and on May 3, 1909, by permission of the Court, filed in the cause an amended answer putting in issue many of the material allegations of the amended petition and also setting up a counterclaim in the nature of a claim at law for damages. The Development Company's claim, upon which judgment was sought against Mackay in both the original and amended petitions, amounted to $1950.00, exclusive of interest and costs; and Mackay's counterclaim upon which judgment was sought against the Development Company, amounted to $3000.00, exclusive of interest and costs. These claims were of such a nature and were so related one to the other that, under the Statutes of Wyoming, either could be interposed as a counterclaim to the other. They also, under those statutes, could be litigated and determined in separate actions, subject only to the limitation that, in the courts of the State, a defendant who omits to set up in his answer an existing counterclaim and subsequently makes it the subject of a separate ac-

tion cannot recover costs in the subsequent action.

Neither the original nor the amended petition of the Development Company presented, upon its face, any Federal question, and the original answer of Mackay merely put in issue the material allegations of those petitions, but in his amended answer Mackay grounded his defense to the Development Company's claim and also his counterclaim against that company, upon certain enumerated statutes of the United States.

At the time of filing his amended answer with the counterclaim, which was after the expiration of the time within which he was required by the laws of the State to answer or plead to the original petition, Mackay, without objection on the part of the Development Company, sought and obtained in the State Court an order removing the cause to the Circuit Court of the United States for the District of Wyoming. This order was sought and was granted upon the theory that the parties were citizens of different states as before indicated, that the construction of Federal statutes necessarily was involved in the determination of the controversy, and that the amount in dispute, as disclosed by the amended answer and counterclaim, exceeded $2000.00, exclusive of interest and costs.

Thereafter a transcript of the pleadings and proceedings in the State Court was filed in the Circuit Court of the United States for the District of Wyoming, and both parties appeared in the latter court and there prosecuted the cause to a final judgment upon its merits. After the removal no change was made in the pleadings, save as the Development

Company filed a reply putting in issue many of the material allegations in Mackay's amended answer, including the counterclaim; and after the removal the parties continued to be designated as before, that is, the Development Company as plaintiff and Mackay as defendant. At no time in the course of the proceedings in the Circuit Court did either party call in question the removal or the jurisdiction of that court, but on the contrary both parties submitted themselves and their claims to its jurisdiction, so far as they could, and sought its decision of the controversy presented by the pleadings. The cause was tried to the court, without a jury, pursuant to a written stipulation filed with the Clerk, wherein the parties agreed so to try the cause; and the finding and judgment were in favor of the Development Company. This writ of error was sued out by Mackay and his assignments of error call in question several rulings made in the course of the trial, but neither party in any wise questions the power of the Circuit Court to try and determine the cause in the circumstances here recited.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law arise upon the record in the cause and that their decision is necessary to its proper disposition, and to the end that the cause rightly may be disposed of such Court desires the instruction of the Supreme Court of the United States upon those questions, to-wit:

1. **May a defendant in an action in a State Court brought by a citizen of the State against a citizen of another State for less than $2000.00, exclusive of interest**

and costs, who has appeared and answered the plaintiff's petition, thereafter lawfully remove the cause to the Circuit Court of the United States upon filing in the State Court, by its leave, an amended answer and a counterclaim for more than $2000, exclusive of interest and costs, when under the State practice he might maintain a separate action on his counterclaim, though under such practice he could not recover costs in such separate action?

2. Assuming that it was optional with Mackay to set up his counterclaim, as was done, or to withhold it and subsequently to make it the subject of a separate action, and that a choice of the latter alternative could not result in the loss of any right, save that if the subsequent action were in a court of the State he could not recover costs therein, Was Mackay so far a plaintiff as respects the counterclaim that it must be disregarded in determining whether or not under the removal statute the cause properly could be removed into the Circuit Court at his instance?

3. Assuming, as respects the counterclaim, that Mackay was a plaintiff and not a defendant, is the provision of the removal statute, which designates the defendant as the party who may obtain a removal when the suit is one between citizens of different states, or is one arising under the laws of the United States, restrictive and jurisdictional in the sense that the Circuit Court acquires no jurisdiction whatever through such a removal unless it be by the defendant, or is the provision only modal and formal in the sense that non-conformity thereto may be waived?

4. Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court

to take cognizance thereof, if he had commenced an action thereon in that Court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counter-claim and thereby have enabled the Court to take cognizance thereof. Did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court, or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counterclaim in that action?

ARGUMENT.

QUESTION ONE.

May a defendant in an action in a State Court brought by a citizen of the State against a citizen of another State for less than $2000, exclusive of interest and costs, who has appeared and answered the plaintiff's petition, thereafter lawfully remove the cause to the Circuit Court of the United States, upon filing in the State Court, by its leave, an amended answer and a counterclaim for more than $2000, exclusive of interest and costs, when under the State practice he might maintain a separate action on his counterclaim, though under such practice he could not recover costs in such separate action?

The disposition of Question One involves the following propositions:

(a) May a defendant in an action, after ap-

pearing and answering and after the time has elapsed within which the defendant, under the statute of the State, is required to plead, thereafter lawfully remove the case to the Circuit Court of the United States, where neither party has called in question the removal or the jurisdiction of the court, but on the contrary have submitted themselves and their claims to its jurisdiction and sought the decision of the controversy presented by the pleadings?

(b) Can the defendant, upon filing in the State Court, by leave of the Court, an amended answer and counterclaim for more than $2000, *exclusive of interest and costs, thereby increase the amount involved in the action so as to give the Circuit Court jurisdiction upon removal; or must the defendant, by pleading, in accordance with the rules and practice of the State Court, a proper counterclaim under the statute of the State, involving an amount in excess of* $2000, *exclusive of interest and costs, be either deprived of the right of removal to the Circuit Court of the United States and be deprived of the right to have the subject matter of the counterclaim litigated in the Circuit Court, or loose his right to recover costs in a separate action brought in the State Court on the subject matter of the counterclaim?*

Under the Removal Act the Circuit Courts of the United States have original cognizance concurrent with the Courts of the several states of all suits of a civil nature at common law or in equity "in which there shall be a controversy between citizens of different states and in which the matter in dispute exceeds, exclusive of interest and costs, the sum

or value of $2000," and provides that any such suit brought in any State Court may be removed by a defendant therein being a non-resident of the State in which the suit is brought. It also provides "that any party entitled to remove any suit * * * may make and file a petition in such suit in such State Court at the time, or at any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court, to be held in the District where said suit is pending."

> Act of Mar. 3, 1887, 24 St. at L., 552, Chap. 373, as corrected by Act of Aug. 13, 1888, 25 St. at L. 433, Chap. 866.

(a) The time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is modal and formal and may be waived.

It was held in Powers vs. Chesapeake & Ohio Ry. Co., 169 U. S. 91, that the provision of the code relative to the time for filing the application for removal is modal and formal and may be waived, is the subject of estoppel and is not jurisdictional. The Court in that case, page 91, uses this language:

> "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either

party. Mansfield C. & L. M. Ry. Co. vs. Swan, 111 U. S. 379 (28:462). But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel. * * * As the time within which a removal must be applied for is not jurisdictional, but modal and formal, it may, though obligatory to a certain extent, be waived."

Ayers vs. Watson, 113 U. S. 594, 597, 599 (28: 1093-1095).

Northern Pacific Railroad Co. vs. Austin, 135 U. S. 315-318 (34: 219).

Martin vs. Baltimore & Ohio Ry. Co., 151 U. S. 673, 688-691 (38: 311, 317, 318).

Connell vs. Smiley, 151 U. S. 335 (39: 443).

In Ayers vs. Watson, 113 U. S. 1094, in construing the Act of 1875, the Court uses this language:

"By Section 3 it is provided that a petition must be filed in the state court before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of the suit into the Circuit Court and with such petition a bond, with condition, as prescribed in the Act. The second section defines the cases in which a removal may be made; the third prescribes

the mode of obtaining it, and the time within which it should be applied for. In the nature of things the second section is jurisdictional and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent, be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. R. R. Co. vs. Swan (ante 462). Application in due time, and the proffer of a proper bond, as required in the third section, are also essential if insisted on, but according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and if these are not properly stated there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not

> belong to the essence of the thing; it is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word jurisdiction is often used somewhat loosely, and no doubt cases may be found in which this matter of time may be spoken of as affecting the jurisdiction of the Court. We do not so regard it."

The time within which the application for removal shall be made not being jurisdictional and not being the essence of the thing in action, but a mere rule of limitation, is modal and formal, and no objection having meen raised the Court acquired jurisdiction in the case at bar, provided the counterclaim interposed is considered in determining the jurisdictional amount involved.

(*b*) *Where a failure to file a counterclaim would prevent the defendant under the Statutes of the State in which the action is brought, from recovering costs in a separate action on his counterclaim, by filing such counterclaim a defendant may increase the amount involved in the action sufficient to give the Federal Court jurisdiction on removal.*

The following cases seem to hold that the amount involved in the counterclaim may be considered as a part of the "matter in dispute" in determining the amount necessary to give the Federal Court jurisdiction, on an application for removal.

Lavell vs. Cragin, 136 U. S. 130.
Block vs. Darling, 140 U. S. 234.

Carson & Rand Lum. Co. vs. Holtzclaw, 39 Fed. Rep. 578.
Lee vs. Ins. Co. (C. C.) 74 Fed. Rep. 424.
Clarkson vs. Manson (C. C.) 4 Fed. Rep. 257.

In Lavell vs. Cragin, 136 U. S. 130, it was sought to dismiss the appeal upon the ground that the amount involved was not sufficient to give the Court jurisdiction, as it did not exceed $5000. The decree appealed from was for $4830.64, but the cross bill of appellant, which had been dismissed by the court below, claimed a decree in behalf of the original defendant for a sum more than $5000, and it was held "when the matter set up in a cross bill is directly responsive to the averments in the bill and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross bill may be taken into consideration in determining the jurisdiction of this court on appeal from a decree on the bill."

Further on the Court says:

> "A motion to dismiss the appeal has been filed and associated with it is a motion to affirm. The first of these motions is based upon the ground that the amount in dispute, as determined by the judgment rendered, is but $4830.64, which is less than the amount required to give us jurisdiction. It is then argued that the amount claimed in the cross bill cannot be added to this amount so as to give jurisdiction, nor can that amount be considered by itself for that purpose. * * *

> The duty of Lavell, as executor of the estate of Miss Quintam, to protect the property, required him to set up the defense in the cross bill as a set-off against the claim and the prayer of the complainant's original bill. We think therefore the amount claimed by the cross bill can properly be taken into consideration in determining the jurisdiction of this court, and as that amount is more than the jurisdictional amount the motion to dismiss is denied."

In Block vs. Darling 140 U. S. 234, the Court held that where defendants not only disputed the whole of plaintiff's demand, but claimed judgment against him for the amount of their counterclaim the amount in dispute on a writ of error by defendants to review for plaintiff a judgment which disallowed their counterclaim, is the aggregate of the demands of the respective sides. The Court, by Mr. Justice Harlan, uses this language:

> "The defendant not only disputed the whole of plaintiff's demand, but claimed judgment over against him for the amount of their counterclaim. So that the amount in dispute here is the aggregate of the demands of the respective sides. As said in Hilton vs. Dickinson, 108 U. S. 164-175 (27: 688, 691) this Court has jurisdiction 'of a writ of error or appeal by a defendant, when the recovery against him is as much in amount or value as is required to bring a

case here, and when, having pleaded a set-off or counterclaim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed.' See also Bradstreet Co. vs. Higgins, 112 U. S. 225 (28:701). The disallowance altogether of the defendants' counterclaim entitled them to a writ of error that would bring up the whole case, the original cause of action as well as the defense and counterclaim. This results from the fact that the defendants claimed that the plaintiff ought not to have judgment in any sum whatever, and that they were entitled to judgment for the amount of their counterclaim."

In considering the question as to whether or not a defendant in an action in a State Court, brought by a citizen of the State against a citizen of another State, for a sum less than $2000, exclusive of interest and costs, who has appeared and answered the plaintiff's petition, can increase the amount necessary in order to give the Federal Court jurisdiction. by setting up a counterclaim, it is necessary to take into consideration the statutes of the State relative to counterclaims. The Statutes of Wyoming, where the action was originally brought, are as follows:

Section 3543. "The answer shall contain:

1. A general or specific denial of each material allegation of the petition controverted by the defendant;

2. A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language."

Section 3544. "The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off as he has, whether they are such as have been heretofore denominated legal or equitable, or both; he may claim therein relief touching the matters in question in the petition against the plaintiff, or against other defendants in the same action; and each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer."

Section 3445. "The counterclaim mentioned in the last preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

Section 3546. "If a defendant omit to set up a counterclaim or set-off, he cannot recover costs against the plaintiff in any

subsequent action thereon; but this section shall not apply to causes of action which are stricken out or withdrawn from the answer, as provided in sections three thousand five hundred and forty-seven and three thousand five hundred and sixty-three."

It will be observed that under these sections of the Wyoming Statutes provision is made for the setting up of the counterclaim presented by Mackay and that Mackay was within his rights and following the civil procedure, as laid down by the Statutes of Wyoming, in filing such counterclaim. The certificate of the Circuit Court of Appeals says "Mackay's counterclaim upon which judgment was sought against the Development Company amounted to $3000, exclusive of interest and costs. These claims were of such a nature and were so related one to the other that under the Statutes of Wyoming either could be interposed as a counterclaim to the other." When Mackay interposed the counterclaim he was within the statute and had he not interposed the counterclaim, but had elected to bring a separate action, under the Wyoming Statute he would have forfeited his right to recover costs in such separate action.

In the case of Lee vs. Ins. Co. 74 Fed Rep. 424, the Court, under a similar statute of the State of Utah, which deprived the defendant of his right to bring a separate action upon a matter which was properly the subject of a counterclaim, held that the counterclaim must be considered in determining the

amount involved necessary to give the Court jurisdiction. The Court uses this language:

> "My inclination is to adopt the conclusion that the amount involved in a counterclaim is a part of the subject matter in dispute within the meaning of the Act of Congress conferring jurisdiction upon the Federal Court and that inclination is strongly fortified in the case at bar by the terms of the Utah Statute. * * * This requires the defendant in a case like that at bar to present his counterclaim in the suit in which the original action is brought, or be forever barred from doing so. 'The matter in dispute,' to use the phraseology of the Act of Congress in question, is not only the $1000 which the plaintiff sues for, but it is that which of necessity, under the statute in question, must be litigated in connection with it. Especially is this so in a case like that at bar, where the defendant has exercised his option to assert his counterclaim, prior to the transfer of this suit to this Court. The motion to remand must therefore be denied."

The fact that the defendant in Wyoming would be deprived of the right to recover costs in a separate action by his failure to set up a counterclaim makes it incumbent upon him, in order to protect himself, to follow the procedure as laid down by the Wyoming Statute and file his counterclaim.

In the case of Clarkson vs. Manson, 4 Fed Rep 257, the Court uses this language:

> "In view of the facts that the suit is in form one brought by the plaintiffs against the defendant and includes the plaintiffs' claim by the voluntary act of the plaintiffs and is made to include the defendant's claim by the operation of the statute of New York, and that thus there is but one suit, though there are two controversies in it, and that the whole suit is to be removed, and that either party may remove it, and that the counterclaim necessarily must tend in some way to diminish or defeat the plaintiffs' recovery, it follows that the whole suit is removed, including all the issues by the complaint, the answer and counterclaim, and the reply."

In Powers vs. Chesapeake & Ohio Ry Co. 169 U. S. 91, the Court, after holding that the time of filing a petition for removal is not essential to the jurisdiction, but merely modal and formal, says:

> "The question whether a defendant may file in a State Court in which the suit was commenced a petition for removal after the time mentioned in the Act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication; and the answer to this question depends upon the terms and effect of the Act in force when these pro-

ceedings took place. * * * This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy no party can be entitled to remove it, and the provision of the Act of Congress that 'any party entitled to remove any suit * * * may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting to the time prescribed for answering the declaration the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute, but would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same state as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2000, and was afterwards discovered to be so much graver that there could be no doubt of the power and the duty of the Court to allow an amendment increasing the ad damnum.

> The reasonable construction of the Act of Congress and the only one which will prevent the right of removal, to which the Statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the Statute, yield to the principal enactment as to the right; and to consider the Statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

This reasoning might apply to the right of the defendant upon interposing the counterclaim, in excess of $2000, exclusive of interest and costs, to invoke the jurisdiction of the Federal Court by re-moving the cause to that court, when the Statute of the State requires the setting up of the counterclaim upon pain of forfeiture of a right. The intent and purpose of the Act, as set forth by Justice Gray, in Powers vs. Chesapeake, etc., supra, is to enable a defendant to invoke the jurisdiction of the Federal Court where diverse citizenship exists, and the jurisdictional amount is involved. If the jurisdictional amount is involved, as shown by the plaintiff's complaint, the defendant, without question, can remove the cause to the Federal Court. If under the Statute of the State in which the action is brought the defendant is required to plead his set-off or counter-

claim, or forfeit some rights in a separate action brought thereon, as in the State of Wyoming, or as in the State of Utah be deprived of bringing any suit thereon thereafter, it would seem to follow that a counterclaim when interposed under such circumstances must of necessity be considered in determining the jurisdictional amount involved in the action, the spirit and intent of the Removal Statute being to give the defendant the opportunity to invoke the forum of the Federal Court, where of necessity, the jurisdictional amount is involved.

In Carson & Rand Lumber Co. vs. Holtzclaw, 39 Fed., page 580, the Court uses this language:

> "The right to plead matters by way of counterclaim has been so much enlarged by the code of procedure now in force in many states that it will often happen, as in this case, that a non-resident plaintiff forced to sue in a state court for a small amount that is perhaps undisputed will find himself confronted by a large demand in the shape of a counterclaim, that he would have been entitled to remove to the Federal Court had the plaintiff in the counterclaim been the first to sue. By the language employed in the Statute Congress, I think, intended to secure to the non-resident the right of removal in such cases, if the existence of local prejudice was satisfactorily shown. Unless this view is adopted it will deprive non-residents of

> their right to choose the tribunal in which to have their rights determined in a very large class of cases."

If the spirit and intent of the Statute be considered in the light that the Statute was enacted, viz: to afford non-residents the right to select the forum in which disputes might be settled where diverse citizenship exists and the requisite amount is involved, or the construction of a Federal Statute is required, it would seem to follow that the object, purport and intent of the Statute ought not to be defeated as a result of State Statutes, which give the defendant the alternative of pleading a counterclaim or forfeiting some right. The Statute intended that where diverse citizenship existed and the amount involved exceeded two thousand dollars that the non-resident might, at his option, remove the case to the Federal Court. The Statutes of some states provide that a counterclaim must be plead or certain of the defendant's rights forfeited, and thereby makes it incumbent upon the defendant to plead the counterclaim. If the defendant is a non-resident and he pleads a valid counterclaim, involving an amount in excess of two thousand dollars, exclusive of interest and costs, and thereby complies with the rules and practice as laid down by the State law, why should he be deprived of the right to have the dispute, which necessarily involves the jurisdictional amount, tried in the Federal Court?

If a non-resident plaintiff invokes the jurisdiction of the State Court because the matter involved

in the first instance does not exceed two thousand dollars, and a resident, by counterclaim, presents issues in which the jurisdictional amount is involved, why should the non-resident be deprived of the right of the Federal forum, when it is clear that the Act intended to give him that right, where the amount involved exceeds two thousand dollars. It would seem that the Statute ought to be construed so as to effect the results intended, to-wit: That of giving the non-resident access to the Federal Courts, where the amount actually in controversy exceeds two thousand dollars, exclusive of interest and costs, although that amount is made up by the claim original petition or by a counterclaim rightfully and properly asserted under the Statute of the State wherein the action was commenced.

The cases of the United States Circuit Courts are conflicting and irreconsilable. The following cases go to sustain the position that the amount involved in the counterclaim cannot be considered in order to increase the sum sued for by the plaintiff, so as to give the Federal Court jurisdiction.

LaMontagne vs. T. W. Harvey Lum. Co. (C. C.) 44 Fed. Rep. 645.

Falls Wire Mfg. Co. vs. Broderick, (C. C.) 6 Fed. Rep. 654.

Bennett vs. Devine, (C. C.) 45 Fed. Rep. 705.

McKown vs. Kas. & T. Coal Co., 105 Fed. Rep. 657.

In the case of McKown vs. Kas. & T. Coal Co. (supra.) the Court uses this language:

> "In states where the defendant, if he has a counterclaim, is compelled under the State Code to plead the same, a contrary rule may be essential to the ends of justice, but in this state the defendant is not compelled to plead his counterclaim. He may or may not do so at his election."

In LaMontagne vs. Lumber Co. (supra.), the Court, while holding that the defendant in the original action did not, upon setting up a counterclaim in an amount in excess of two thousand dollars, become a plaintiff under the Removal Act, so that he could not apply for removal as defendant under said Act, held that a counterclaim cannot be properly deemed a part of the "matter in dispute." The Court admits that, in a general sense, the "matter in dispute" in an action embraces the subject of the counterclaim, but holds that it is not so embraced within the meaning of the Removal Act, so that the amount of the counterclaim might be considered in determining the jurisdictional amount involved. At page 647 the Court uses this language:

> "It is apparent from the language of the act that no suit can now be removed to a Federal Court which could not originally have been brought there, except when the sole objection to the original jurisdiction was the non-residence of the defendant.

> Here another objection existed, viz: That the "matter in dispute" at the commencement of the action did not amount in value to the sum requisite to confer jurisdiction. Can jurisdiction be conferred by the assertion of a counterclaim by the defendant? The right to assert such claim in the State Court is permissive, not obligatory. He, therefore, as to the counterclaim, has selected his forum. If he were plaintiff to the record as he is in fact *quoad* the counterclaim, he could not remove his cause. I, however, concede his right so to do if the amount of the counterclaim can properly be considered as part of the "matter in dispute" within the meaning of the act."

It will be observed that the Court says "the right to assert such counterclaim in the State Court is permissive, not obligatory." If the case of La-Montagne vs. Lumber Company had arisen in the State of Wyoming or the State of Utah, where the setting up of a counterclaim by the defendant would have been imperative, or the failure so to do would result in the loss of a right, and not as in Wisconsin, where the setting up of the counterclaim was simply permissive, the learned court might have come to an entirely different conclusion. In none of the cases tending to sustain the contention that a counterclaim cannot be considered in determining the "matter in dispute" has the State law under which the counterclaim was plead required the pleading of the counterclaim or the forfeiture of some

right, such as the Wyoming Statute requires.

The following cases relate to the right of a non-resident plaintiff, who has brought a suit in a State court for a sum less than the jurisdictional amount, to which a counterclaim has been filed for a sum in excess of the jurisdictional amount, of becoming a defendant as to the counterclaim, so that he may remove the case to the Federal Court under the Act of March 3, 1887. 25 U. S. Statutes at Large, page 433, Chap. 866.

Carson & Rand Lumber Co. vs. Holtzclaw, (C. C.) 39 Fed. Rep. 578.

Waco Hdw. Co. vs. Mich. Stove Co., 91 Fed. Rep. 289, 33 (C. C. A.) 511.

West vs. Aurora City, 6 Wallace 139, 18 L. Ed. 819.

Walcott vs. Watson, (C. C.) 46 Fed. Rep. 529.

In Carlson & Rand Lumber Co. vs. Holtzclaw, (supra.), and Walcott vs. Watson, (supra), it is held that where a non-resident plaintiff institutes in a State Court a suit for a sum less than the jurisdictional amount in the Federal Court, and thereupon the defendant files a counterclaim for an amount within the jurisdiction of the Federal Court, the plaintiff becomes a defendant as to the counterclaim and can remove the case to the Federal Court, while in Waco Hdw. Co. vs. Mich. Stove Co. (supra), and West vs. Aurora City (supra), the direct contrary is held.

From the foregoing authorities and for the rea-

sons above set forth it is respectfully urged that a defendant in an action in a State Court, brought by a citizen of the state against a citizen of another state, for less than two thousand dollars, exclusive of interest and costs, who has appeared and answered the plaintiff's petition, may thereafter lawfully remove the cause to the Circuit Court of the United States, upon filing in said State Court, by its leave, an amended answer and counterclaim for more than two thousand dollars, exclusive of interest and costs, when under the State practice he might maintain a separate action on his counterclaim, though under such practice he could not recover costs in such separate action.

QUESTION TWO.

Assuming that it was optional with Mackay to set up his counterclaim, as was done, or to withhold it and subsequently to make it the subject of a separate action, and that a choice of the latter alternative could not result in the loss of any right, save that if the subsequent action were in a court of the State he could not recover costs therein, was Mackay so far a plaintiff as respects the counterclaim that it must be disregarded in determining whether or not under the removal statute the cause properly could be removed into the Circuit Court at his instance?

Mackay was not so far a plaintiff as respects the counterclaim that the counterclaim must be disregarded in determining whether or not under the removal statute the cause properly could be removed into the Circuit Court at Mackay's instance.

Section 3544 of the Statutes of Wyo-

ming provides: "The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off as he has."

Section 3545 of the Statutes of Wyoming provides: "The counterclaim mentioned in the last preceding section must be one existing in favor of a defendant and against a plaintiff."

Under the Statutes of Wyoming the defendant in the original petition is treated and spoken of as "defendant" by the terms of the Statute authorozing the setting up or pleading of a counterclaim. We believe the term "defendant," or "defendants," as used in the removal act was used in its commonly accepted sense, and not with respect to the attitude of the parties as to various causes of action preferred in one suit.

In the case of LaMontagne vs. T. W. Harvey Lumber Co., 44 Fed. Rep. 645, the Court, in interpreting the question as to whether a defendant, although an actor or plaintiff as to the counterclaim, does not still remain the party who alone has the right of removal to the Federal Court, at page 646, uses this language:

> "The term 'defendant' was, I think, used in the removal act in its commonly accepted sense, and not with respect to the attitude of parties as to various causes of action preferred in one suit. The plaintiff is the party with whom the cause originates.

The defendant is the party summoned to answer. Whatever causes of action may be permitted to be alleged against the plaintiff, he still remains the plaintiff upon the record; his antagonist, the defendant. The State Statute so treats the matter. The counterclaim is a cause of action existing in favor of a defendant, and judgment thereon is rendered to the defendant. Rev. St. Wis. Sec. 2662. There is but one suit, however numerous the causes of action involved, and although some one or more of them exist in favor of the defendant. In that suit, the party by whom it was instituted is the plaintiff, and so remains, whatever claims may be preferred against him. In that suit the party summoned is the defendant, and so remains, whatever rights he is permitted to assert against the plaintiff. It is to this party, known to the record as the defendant, being a non-resident that the law grants the right of removal. It is not given to the original plaintiff under any circumstances. Other construction would give to a non-resident plaintiff, who had selected as his forum a state tribunal, or to whom the Federal Court was denied because of the amount of his claim, the right to bring that controversy into the Federal Court, notwithstanding the removal act denies him that right, because his antagonist had asserted a claim. Invoking the assistance of a state court the plaintiff was bound to know

the right of the defendant to counterclaim, and submitting to the jurisdiction he submitted in its whole extent. West vs. City of Aurora, 6 Wall. 139."

The Court in this case concludes by saying:

"If, therefore, the amount of the counterclaim can be properly deemed part of the "matter in dispute" the defendant may rightfully remove the cause."

McKown vs. Kas. & T. Coal Co., 105 Fed. 657.

In the case of Walcott vs. Watson, 46 Fed. Rep. 529, the question there arose as to whether or not a non-resident plaintiff, sueing in the State Court, against whom a counterclaim is brought, becomes thereby a defendant within the provisions of the removal act of Congress (25 U. S. St. 433, Chap. 866), that in a controversy between citizens of the state where the suit is brought and citizens of another state, any defendant, being such citizen of another state, may remove the suit into the United States Circuit Court on the ground of prejudice and local influence, and the court held that the plaintiff became defendant as to such counterclaim and as such defendant might petition for removal. The Court, at page 530, uses this language:

"The counterclaim set up in the answer is a cause of action in favor of the defendant, upon which he might have sued the plaintiff and obtained affirmative relief. By

filing the counterclaim to the plaintiff's action the defendant becomes an affirmative actor. The counterclaim creates a controversy in which the attitude of the respective parties is changed. When the plaintiff brought this suit she chose the forum of the State Court to litigate the matters presented by her complaint. When the defendant filed his answer it presented a new and independent issue and was not wholly in the nature of a defensive plea, as in West vs. City of Aurora. Moreover, the facts in that case were dissimilar from the facts in this case, and the Statute of this state in relation to counterclaims is in some respects essentially different from the provisions of the Code of Indiana, upon which that decision was based. See Gen. Stat. Nev. Sec. 3068."

It would seem that the court in this case intimates by reference to the Statutes of the respective states that the Statutes of the particular state in which the action arises should be considered in construing the removal act.

In Carson & Rand Lum. Co. vs. Holtzclaw, 39 Fed. Rep. 578, it is held that a non-resident plaintiff, sueing in the State Court, against whom a counterclaim is brought, is a defendant as to the counterclaim, within the provisions of the act, which limits the right of removal to the defendant, being a citizen of another state than that in which the suit is brought.

Where a claim of a non-resident plaintiff was less than two thousand dollars and he had thereby been forced to select the State forum in which to litigate his claim, and the resident defendant set up a proper counterclaim for an amount in excess of two thousand dollars, exclusive of interest and costs, it may be doubtful as to the right of removal of the non-resident plaintiff, he having selected the State forum, or to use the language of the court in LaMontagne vs. T. W. Harvey Lumber Co., (supra) in "invoking the assistance of the State Court the plaintiff was bound to know the right of the defendant to counterclaim and submitting to its jurisdiction he submitted in its whole extent." But even if the non-resident plaintiff in the State Court knew of the counterclaim which the resident defendant might file he was helpless to invoke the jurisdiction of the Federal Court in the first instance. If the statutes of the state in which the action was brought made the pleading of the set-off or counterclaim permissive or optional with the defendant, and the defendant would forfeit no rights and would assume no additional burdens by failing to plead the counter-claim, the non-resident plaintiff could not be charged with a knowledge that the existing counterclaim or set-off would be plead. He might assume that the defendant would plead his set-off or counterclaim where the State Statute made the pleading of a set-off or counterclaim obligatory, to the extent that the failure to so plead would terminate the right of the defendant to have litigated his counterclaim, as provided by the Utah Statute, or would deprive the defendant from recovering costs

if he brought a separate action under the Wyoming Statutes. But even with this knowledge the non-resident plaintiff in the State Court could exercise no right of selection in the first instance. The amount of his claim being less than that required to give the Federal Court jurisdiction he must of necessity sue in the State forum or not at all.

If it be assumed that a counterclaim should be considered in determining the jurisdictional amount involved, where as in the State of Wyoming and the State of Utah, it is not optional with the defendant as to whether or not he shall set up a counterclaim, the Statute providing that he shall forfeit some right upon his failure to set up the counterclaim; then it would seem to follow that the defendant, being compelled to plead his counterclaim, or forfeit his rights, ought to have the privilege, when the amount involved is within the jurisdiction of the Federal Court, to invoke the jurisdiction of that court to the same extent as the jurisdiction of that court might have been invoked had the requisite amount appeared on the plaintiff's petition in the first instance. The fact that the right forfeited under the State Statutes upon failure to plead a proper set-off or counterclaim may be of minor or grave importance to the party required under the State Statutes to so plead, is immaterial. The extent of the right does not effect the principle involved. The Court, we believe, will construe the Removal Act, if possible, so as to conserve and preserve all the rights of the litigants seeking to enjoy the benefits which the Removal Act intended to bestow.

It would also seem to follow that wherein an action brought by a non-resident in a state court for an amount less than two thousand dollars, the defendant, a resident, filed a proper counterclaim for an amount in excess of two thousand dollars, exclusive of interest and costs, that the non-resident plaintiff, not having prior to the pleading of the counterclaim by the resident defendant, had an opportunity to invoke the jurisdiction of the Federal Court, ought to be permitted to invoke the jurisdiction of the Federal Court by reason of the counterclaim. Congress evidently did not have in mind, when the Act was passed, the particular statutes of the several states then in existence, or consider the acts which might be passed by the several states relative to set-offs or counterclaims, and therefore the reasonable and equitable construction of the Removal Act would seem to be that construction which would enable the non-resident plaintiff or defendant, whichever he might be, to invoke the jurisdiction of the Federal Court, as soon as it appeared in the course of the proceedings, whether in the original petition or in a counterclaim set up, that the amount necessary to give the Fedral Court jurisdiction was involved. We think that under the authorities it is established that counterclaims properly plead must be considered in determining the amount involved, and if they are to be considered in determining the amount involved, then it follows that the removal statute ought to be so construed as to enable a non-resident, be he considered plaintiff or defendant, to invoke the jurisdiction of the Federal Court, when the counterclaim plead must be considered in order that the "matter

in dispute'' might exceed two thousand dollars, exclusive of interest and costs. We assert this as a matter of right, and particularly should this be the rule where the plaintiff and the defendant, without objection, have subjected themselves on the petition and the counterclaim to the jurisdiction of the court, and have not questioned the right of the Federal Court to determine the issues presented, but have expressly, by written stipulation, filed in the Federal Court, agreed that the cause might be tried.

QUESTION THREE.

Assuming, as respects the counterclaim, that Mackay was a plaintiff and not a defendant, is the provision of the removal statute, which designates the defendant as the party who may obtain a removal when the suit is one between citizens of different states, or is one arising under the laws of the United States, restrictive and jurisdictional in the sense that the Circuit Court acquires no jurisdiction whatever through such removal unless it be by the defendant, or is the provision only modal and formal in the sense that non-conformity thereto may be waived?

The provision of the removal statute which designates the defendant as the party who may obtain a removal when the suit is one between citizens of different states, or is one arising under the laws of the United States, is modal and formal in the sense that conformity thereto may be waived, when applied to the defendant in an action, who has properly plead a counterclaim, and may thereby be designated plaintiff as to the counterclaim.

If Congress intended to secure to the non-

resident the right of removal in cases where the amount involved exceeded two thousand dollars, exclusive of interest and costs, and if it be held that counterclaims may be considered in determining the amount involved, whether such counterlcaim is interposed by the resident or non-resident, it would seem to follow that the non-resident, as defendant in the original petition, or as plaintiff in the counterclaim set up by such non-resident, or as defendant in a counterclaim set up by a resident in an action brought in a State court by a non-resident, whether he be designated as defendant or plaintiff, may obtain a removal, and when applied in actions in which the counterclaim is relied upon to give the jurisdictional amount, that the provision of the removal statute, which designates the defendant as the party who may obtain a removal, is modal and formal, is not jurisdictional and may be waived.

Where the defendant in an action by a non-resident in a State court, to rocover a sum less than two thousand dollars, files a counterclaim by which he seeks to recover a sum greater than two thousand dollars, the cause is removable by the plaintiff at or before the time he is required to plead to such counterclaim.

Price & Hart vs. T. J. Ellis & Co., 129 Fed. Rep. 482.

Carson & Rand Lum. Co. vs. Holtzclaw, 39 Fed. Rep. 578.

The contrary has been held in the following cases:

Waco Hdw. Co. vs. Mich. Stove Co., 91 Fed. Rep. 289.

West vs. Aurora City, 6 Wall. 139.

McKown vs. Kas. & T. Coal Co., 105 Fed. Rep. 657.

If it be assumed that Mackay is plaintiff as respects the counterclaim, it would seem to follow that as such plaintiff he ought to be permitted to select the forum in which should be tried the subject matter of his counterclaim, which on its face shows concurrent jurisdiction in the State and Federal Courts. If Mackay in the first instance, had brought an action on the subject matter of the counterclaim he could have invoked the jurisdiction of the Federal Court. By proper pleading under the State Statute he was required to set up his counterclaim or lose some of his rights, which as a litigant he was entitled to protect. Having done that which he was required to do in the protection of his rights shall it be said that he is now deprived of the beneficent and equitable provisions of the Removal Act intended to guarantee to litigants of diverse citizenship the protection in the administration of their rights and liberties as determined by resort to a Federal Tribunal? It is respectfully submitted that the essence of the act, as determined by the intent and purpose for which the removal measure was enacted should control, and that modal and formal directions as to the manner of enforcing the rights ought not to be treated and construed as jurisdictional in their nature, to the extent of defeating the rights intended

by the very nature and purpose of the Removal Act to be protected. So we say that even assuming that Mackay was as to the counterclaim plaintiff, the Removal Act which designates the "defendant" or "defendants" as the parties who may obtain a removal is not restrictive and jurisdictional in the sense that the Circuit Court acquires no jurisdiction upon removal made upon petition of Mackay, but on the contrary the provision that the "defendant" or "defendants" may remove the cause upon application, applies to a defendant who may become or be designated plaintiff as to a counterclaim properly pleaded by him, or to a non-resident plaintiff in an action for a sum less than two thousand dollars, in a State court, who has become or is designated defendant as to a counterclaim properly interposed by a resident defendant; and to this extent the provision is modal and formal and may be waived, just as the time in which application for removal may be waived.

QUESTION FOUR.

Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and ass-uming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that Court, and assuming that in such an action the Development Company could have lawfully set up its claim as a counterclaim and thereby have enabled the court to take cognizance thereof, Did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any

objection to the jurisdiction of the court, or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein, with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counterclaim in that action?

The parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court, or to the manner in which its jurisdiction was invoked, enabled the court to take cognizance of the controversy and proceed to a final judgment therein, with like effect as though they had invoked the jurisdiction of the court in the first instance, through an action commenced by Mackay therein upon his counterclaim and through the interposition by the Development Company of its claim as a counterclaim in the action.

It would seem to follow under the authorities already cited and the observations heretofore in this brief made that if the claim of Mackay against the Development Company contained all of the jurisdictional elements necessary to enable the Circuit Court to take cognizance thereof, if Mackay had commenced an action thereon in that court in the first instance, and that the claim of the Development Company against Mackay was a proper subject for a counterclaim as against Mackay, even though removal by Mackay was not in conformity with the Removal

Statute, the parties by appearing and litigating without objection the matters presented by both parties, waived all formalities as to the manner of invoking the jurisdiction of the Federal Court.

The object of the removal Statute is to give litigants the right, when all the jurisdictional elements essential to give the Federal Court jurisdiction are present, to have determined in the Federal Court the matter in controversy. The Court is not concerned as to the method or procedure by which the jurisdiction is invoked, except that it is desired that the rules and regulations made in the interest of litigants and proper court procedure be substantially complied with, and when it appears that parties in action are not insisting upon strict compliance with the rules prescribed, and when the intent and purpose of the Statute is not being effected by a failure to comply with the rules or procedure prescribed, there seems to be no good reason why the court of its own motion would decline to assume jurisdiction of the subject matter presented by the respective parties to the action, simply because some modal or formal rule of procedure, made primarily in the interests of the litigants and waived by such litigants, is not strictly pursued.

In Powers vs. Chesapeake & Ohio Ry. Co., 169 U. S. 99, with reference to the construction of the Removal Act, it was said:

> "The reasonable construction of the Act of Congress and the only one which

> will prevent the right of removal to which the statute declares the party to be entitled from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to time must, when necessary to carry out the purposes of the statute, yield to the principal enactment as to the right and to construe that statute as in intention and effect permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable cause in the court in which it was brought."

This reasoning applies, we think, with equal force, not only to the incidental provision as to time, but also to all modal and formal provisions as to the manner of invoking the jurisdiction of the Federal Court.

Under the better reasoning of the authorities in this brief cited and for the reasons herein set forth, it is respectfully submitted that the Federal Court acquired jurisdiction of the parties litigant and the subject matter of the action herein.

Respectfully submitted,

BARNARD J. STEWART,
CHARLES B. STEWART,
Attorneys for Plaintiff in Error.

SAMUEL J. STEWART,
DANIEL ALEXANDER,
Of Counsel.

In the Supreme Court of the United States

No. 22,450.

JOHN C. MACKAY,
vs.
UINTA DEVELOPMENT COMPANY.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

I.
STATEMENT OF CASE

This case is in this Court upon four questions of law, certified by the Court of Appeals of the Eighth Circuit.

It was originally an action at law in trespass to recover Nineteen Hundred Fifty ($1950.00) Dollars, brought in the District Court for Uinta County, Wyoming, by Uinta Development Company, the defendant in error, a citizen and resident of Wyoming, against John C. Mackay, a citizen and resident of

Utah. A counterclaim at law arising out of the same matters demanding Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, was filed in the case by Mackay against the Development Company as permitted by the laws of Wyoming. The counterclaim is largely grounded upon certain Federal Statutes enumerated and quoted therein. After filing his counterclaim, Mackay filed in the State Court his petition to remove the cause into the United States Circuit Court for Wyoming, which petition was allowed by the State Court which granted an order removing the cause. Both parties thereafter appeared in the United States Circuit Court for the District of Wyoming, the Development Company exhibiting its claim against Mackay who, in turn, exhibited his answer and his cross complaint against the Development Company. Thereupon, in the Federal Court the Development Company answered the cross complaint and both parties proceeded to trial and judgment without objection to the jurisdiction, both parties, in fact, submitting to and actively invoking the jurisdiction of the Federal Court. The Court of Appeals for the Eighth Circuit, after certifying to this Court the facts upon which the questions arise, certified the questions of law as follows:

> "1. May a defendant in an action in a State Court brought by a citizen of the State against a citizen of another State for less than $2000,

exclusive of interest and costs, who has appeared and answered the plaintiff's petition, thereafter lawfully remove the cause to the Circuit Court of the United States upon filing in the State Court, by its leave, an amended answer and a counterclaim for more than $2000, exclusive of interest and costs, when under the State practice he might maintain a separate action on his counterclaim, though under such practice he could not recover costs in such separate action?

"2. Assuming that it was optional with Mackay to set up his counterclaim, as was done, or to withhold it and subsequently to make it the subject of a separate action, and that a choice of the latter alternative could not result in the loss of any right, save that if the subsequent action were in a court of the State he could not recover costs therein, Was Mackay so far a plaintiff as respects the counterclaim that it must be disregarded in determining whether or not under the removal statute the cause properly could be removed into the Circuit Court at his instance?

"3. Assuming, as respects the counterclaim, that Mackay was a plaintiff and not a defendant, Is the provision of the removal statute, which designates the defendant as the party who may obtain a removal when the suit is one between citizens of different states, or is one arising under the laws of the United States, restrictive and jurisdictional in the sense that the Circuit Court

acquires no jurisdiction whatever through such a removal unless it be by the defendant, or is the provision only modal and formal in the sense that non-conformity thereto may be waived?

"4. Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counterclaim and thereby have enabled the court to take cognizance thereof, Did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counterclaim in that action?"

We assume that wherein these questions are put abstractly, either wholly or in part, they are rendered concrete by the facts certified.

In this case, there was assent and acquiescence by the State Court in the withdrawal of the parties and their controversy from the jurisdiction of that court because the State Court granted the removal by its express order. There was likewise assent and affirmative acquiescence in the jurisdiction of the United States Circuit Court by the Uinta Development Company, for it appeared in the Federal Court without making objection at any stage of the proceedings, there filed its answer to the counterclaim, joined in a request that the court try the cause without the intervention of a jury, and participated in the trial. There was assent, acquiescence and affirmative invoking of the jurisdiction of the Federal Court by John C. Mackay in that he brought the cause by removal to the Federal Court, filed in that Court the pleadings of both parties whereby the controversies were exhibited, invoked the Federal Court to adjudge the matter, joined in the prayer that the court try the cause without a jury, and participated in the trial.

There has been no objection, either in the Circuit Court or in the Court of Appeals or here to the jurisdiction of the Court over the parties, but active acquiescence instead.

II.
BRIEF OF THE ARGUMENT

The certificate from the Circuit Court of Appeals in this cause states the following:

> "The Development Company's claim, upon which judgment was sought against Mackay in both the original and amended petitions, amounted to $1,950.00, exclusive of interests and costs; and Mackay's counterclaim, upon which judgment was sought against the Development Company, amounted to $3,000.00, exclusive of interest and costs. These claims were of such a nature and were related one to the other that, under the Statutes of Wyoming, either could be interposed as a counterclaim to the other. They also, under those Statutes, could be litigated and determined in separate actions, subject only to the limitation that, in the courts of the state, a defendant who omits to set up in his answer an existing counterclaim and subsequently makes it the subject of a separate action cannot recover costs in the subsequent action."

Under this statement it is clear that both the original demand of the plaintiff against the defendant for $1,950.00 and the demand of the defendant against the plaintiff for $3,000.00 were properly brought together in the same action.

As a matter of fact, both the plaintiff and the defendant, as we have seen, came into the Federal Court, bringing this their controversy and asking that court to adjudicate between them. They were citizens of different states and therefore could invoke the jurisdiction of the Federal Circuit Court, provided the amount in controversy exceeded $2,000.00, besides interest and costs.

This Court, in many cases for the purpose of ascertaining jurisdiction, has decided that not only the claim of the plaintiff against the defendant but the demand of the defendant against the plaintiff by way of counterclaim, is to be taken into account in ascertaining the amount in controversy.

Dushane v. Benedict, 120 U. S., 630, 636.
Lovell v. Cragin, 136 U. S., 130, 140.
Block v. Darling, 140 U. S. 234, 237.

"A Circuit Court may proceed to judgment on a cross bill where defendant's pecuniary claim is less than $2,000, if the jurisdictional amount in dispute appears from bill, answer and cross bill which relate to the same transaction, notwithstanding the original bill has been voluntarily dismissed."

Kirby v. American Soda Fountain Company, 194 U. S., 141.

It seems clear, therefore, that the amount involved in the present controversy, was sufficient

to bring the case within the jurisdiction of the Federal Circuit Court if filed and exhibited by the parties at the same time as a single controversy. Indeed, the counterclaim of the plaintiff in error is itself sufficient to bring the case within the jurisdiction of the Federal Circuit Court.

But the matter, so far as the Federal Court was concerned, was all presented as the one controversy between the parties involving claims on the one side and on the other, and all presented at the same instant. Both parties likewise, appeared and without objection of any sort, and so far as they could do so, asked that the Federal Court adjudge between them.

It seems fairly clear therefore, that if the State Court had never had any jurisdiction over this controversy, it could properly have been brought before the Federal Court. Nor do we see that the question is greatly affected by the terms "plaintiff" and "defendant". Viewing the matter as a mere controversy submitted in the first instance to the Federal Court, each party was plaintiff and actor as against the other and each was defendant from the standpoint of the complaints made by the other. Moreover, the demand of each party was a counterclaim as against the demand of the other so that either may be properly styled "plaintiff" and either may be properly styled "defendant." Each party became an actor and, by that, submitted the controversy, so far as he was able to do so, to the Federal Court for adjudication. Each

party "invoked the jurisdiction of the court in the same action, and by involving submitted to it."

Merchants Heat and Light Company v. J. C. Clow and Sons, 204 U. S. 286, 290, and authorities there cited.

Texas and Pacific Railway Co. v. Eastin, 214 U. S. 153, 159.

In re Moore, 209 U. S. 490, 495.

Viewing the situation broadly, therefore, the so-called counterclaim of the plaintiff in error was a cause of action in favor of the plaintiff in error which was within the jurisdiction of the Federal Court because, first, the plaintiff in error was a citizen of Utah, and the defendant in error was a citizen of Wyoming; second, the amount in controversy upon the so-called counterclaim is more than $2,000.00, exclusive of interest and costs. The matter being so brought to the Federal Court, it was within the power of that Court, under the Wyoming Statute, to permit the defendant in error to file its counterclaim in the sum of $1,950.00, and the fact that this counterclaim was below the jurisdictional amount did not oust the jurisdiction of the Federal Court.

What effect upon the jurisdiction of the Federal Court results from the fact that the State Court had previously taken jurisdiction of the same controversy?

An interesting case bearing, as it seems to us, upon the question here, is the case of Anderson v. United Realty Company, 222 U. S. 164. In that case

a proper petition and bond for removal from the State Court to the United States Circuit Court had been filed. There was no remander by the Federal Court nor any action of any sort in the Federal Court to divest the jurisdiction of that Court. Yet the parties appeared in the State Court and litigated their differences. Upon that situation this Court held,

> "The state court had jurisdiction over the subject-matter. It recovered jurisdiction over the remaining parties by action and conduct equivalent to a formal waiver of new process and new pleadings or any formal remander by the United States court."
>
> 222 U. S., 164, 166.

That the State Court was divested of jurisdiction in the case last above cited, and that the jurisdiction of the Federal Court attached upon the filing of the requisite petition and bond, has been frequently decided by this Court.

Steamship Company v. Tugman, 106 U. S. 118, 122.

St. Paul & Chicago Railway Company, v. McLean, 108 U. S. 212, 216.

Stone v. South Carolina, 117 U. S. 430, 432.

Crehore v. Ohio and Mississippi Railway Company, 131 U. S. 240, 243.

Marshall v. Holmes, 141 U. S. 589, 595.

Madisonville Traction Company v. Saint Bernard Mining Company, 196 U. S. 239, 244.

It seems to us that the case of Anderson v. United

Realty Company, *supra*, passes upon the exact question that is here. The only real difference is that in that case the parties by their appearance and consent in the State Court gave or rather restored to that Court jurisdiction of a cause which had been taken from the jurisdiction of the State Court and placed within the jurisdiction of the Federal Court. In this case the consent vests in the Federal Court the jurisdiction which, without that consent, would have remained in the State Court.

The consent or acquiescence of the Federal Court in the case last above cited was not deemed necessary in order that the parties might have the opportunity to consent that their controversy might be adjudged by the State Court. No such consent was given directly or indirectly by the Federal Court.

Were the consent of the State Court necessary in the case at bar, that court, so far as it could, gave consent to the action of the parties and permitted the controversy to be withdrawn from its jurisdiction.

> "A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the Federal court."
>
> *Kinney v. Columbia Savings &c. Assn.*, 191 U. S., 78, 82.

It is therefore held that such petition and bond are subject to amendment as other process.

Kinney v. Columbia Savings &c. Assn., supra.

The petition and bond—the various elements of process—are but modal and formal.

> "By Sec. 2 of the act of 1875, any suit of a civil nature, at law or in equity, brought in a State court, where the matter in dispute exceeds the value of $500, and arising under the Constitution or laws of the United States, or in which the United States is plaintiff, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign State, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district, and when in any such suit there is a controversy wholly between citizens of different States, which can be fully determined as between them, one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States for the proper district. This is the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal. By Sec. 3 it is provided that a petition must be filed in the State court before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of the suit into the Circuit Court, and with such petition a bond, with condition, as prescribed in the act. The second section defines the cases in which a

removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record, the directions of the third, though obligatory, may to a certain extent be waived. Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. Mansfield & Coldwater Railway Co. v. Swan, 111 U. S. 379. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing; it is not, in its nature, a juris-

dictional matter, but a mere rule of limitation. In some of the older cases the word jurisdiction is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not regard it. And since the removal was effected at the instance of the party who now makes the objection, we think that he is estopped. In Railroad Co. v. Koontz, 104 U. S. 5, 17, we held that where the State court disregarded a petition for removal properly made, and the plaintiff continued to prosecute the suit therein, he would be deemed to have waived any objection to the delay of the defendant in entering the cause in the Circuit Court of the United States until the decision of the State court is reversed.

"We do not think that this assignment of error is well taken."

Ayers v. Watson, 113 U. S., 594, 597.

Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 684.

This process by removal constitutes the method by which the Federal Court obtains jurisdiction of the person.

"Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party in the progress of the cause."

Cooper v. Reynolds, 10 Wallace (77 U. S.) 308, 316.

Toland v. Sprague, 12 Peters (37 U. S.) 300, 330.

Hill v. Mendenhall, 21 Wallace (88 U. S.) 453, 454.

"The point of jurisdiction made by the plaintiffs in error is considered as free from all doubt. By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently, waived all objections to the non-service of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the state court in which it was instituted, and this court would be bound now to direct that proceeding."

Pollard v. Dwight, 4 Cranch (8 U. S.) 421, 428.

We do not contend in the case at bar that the removal proceedings would have been sufficient of themselves and over objection to vest in the United States Circuit Court for the District of Wyoming jurisdiction in the case at bar. What we do contend is that jurisdiction of the cause in the Federal Court was made full and complete by the appearance, the waiver, the consent, and the active invoking of jurisdiction by both parties.

In the case of In re Moore, 209 U. S., 490 at page 508, the Court, after a full discussion of authorities and after having asked two questions, "First, whether both parties did consent to accept the jurisdiction of the United States Court; and, second, if they did,

what effect such consent had upon the jurisdiction of the United States Court?", and after having answered in full the first question, namely, that both parties did consent, answers the second to the effect that the consent gave full and complete jurisdiction, the Court uses this language:

> "We have made these many quotations and references, not simply to establish the doctrine itself, but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule; for, if in a case between citizens of different States, of which the Circuit Courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations."

We submit that the jurisdiction of the United States Circuit Court for the District of Wyoming was complete and that the questions should be answered accordingly.

JOHN W. LACEY,
Attorney for Defendant in Error

MACKAY *v.* UINTA DEVELOPMENT COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 190. Argued March 14, 17, 1913.—Decided May 26, 1913.

Where the defects in service of process and in procedure in the state court are waivable, and after removal there is presented to the Circuit Court a controversy involving more than $2,000 and between citizens of different States, that court has jurisdiction and the method of getting the case before the court cannot operate to deprive it of jurisdiction.

Removal proceedings are in the nature of process to bring the parties before the Federal court.

The defendant may waive defects in removal proceedings if jurisdiction actually exists, and if he does so the court will not of its own motion inquire into the regularity of the proceedings.

THE facts, which involve the validity of the removal of this cause from the state to the Federal court and the jurisdiction of the latter thereover, are stated in the opinion.

Mr. Barnard J. Stewart, with whom *Mr. Charles B. Stewart*, *Mr. Samuel W. Stewart* and *Mr. Daniel Alexander* were on the brief, for plaintiff in error.

Mr. John W. Lacey for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

On December 8, 1908, the Uinta Development Company, a corporation of the State of Wyoming, brought an action in a Wyoming court against John C. Mackay, a resident and citizen of Utah, to recover $1,950 damages

for a trespass upon land of the Development Company, situated in Wyoming.

On January 8, 1909, Mackay duly filed his answer. On March 2 the plaintiff, by leave of court, filed an amended petition, which Mackay answered. On May 3 he filed an amended answer, which, in addition to denying many of the allegations of the amended petition, set up a counter-claim for $3,000 damages.

The claims of the parties were so related that either could have been interposed as a counter-claim to the other; or they could have been determined in different suits—subject to the provision that, under the Wyoming statute, a defendant who failed to set up his counter-claim and subsequently made it the subject of a separate action could not recover costs if he prevailed therein. No Federal question was presented in the plaintiff's suit or defendant's original answer, but Mackay's amended answer and counter-claim were grounded upon certain statutes of the United States. This counter-claim for $3,000 was filed after the expiration of the time in which he was required to plead to the original petition.

But, notwithstanding the delay, Mackay, the non-resident, without objection on the part of the Development Company, filed in the state court a petition to remove the case to the United States Circuit Court for the District of Wyoming. An order removing the case was granted on the theory that the parties were citizens of different States; that the construction of the Federal statutes was necessarily involved, and that the amount in dispute, as disclosed by the counter-claim, exceeded $2,000. The transcript was duly filed in the United States court. Both parties appeared. The plaintiff filed in the United States court a reply to Mackay's counter-claim, and the case, which was docketed as "*Uinta Development Company* v. *John C. Mackay*," was submitted to the court for determination without a jury.

Judgment was entered in favor of the Development Company and thereupon Mackay took the case to the Circuit Court of Appeals, assigning errors relating to rulings made in the course of the trial, but neither party raised any question as to its power to determine the cause. On these facts the Circuit Court of Appeals certified to this court various questions as to whether Mackay could remove the case to the United States court, among them the following:

4. "Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counter-claim and thereby have enabled the court to take cognizance thereof, Did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counter-claim in that action?"

This question must be answered in the affirmative and that fact makes it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the

right to remove the case to the United States court. The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularly removed, it could be lawfully tried and determined.

Removal proceedings are in the nature of process to bring the parties before the United States court. As in other forms of process, the litigant has the right to rely upon the statute and to insist that, in compliance with its terms, the case shall be taken from the state to the Federal court in the proper district, on motion of the proper person, at the proper time, and on giving the proper bond. But these provisions are for the benefit of the defendant and intended to secure his appearance. When that result is accomplished by his voluntary attendance, the court will not, of its own motion, inquire as to the regularity of the issue or service of the process,—or, indeed, whether there was any process at all, since it could be waived, in whole or in part, either expressly or by failing seasonably to object. *Powers* v. *C. & O. Ry.*, 169 U. S. 92, 98.

What took place in the state court may, therefore, be disregarded by the court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the Circuit Court a controversy between citizens of different States in which the amount claimed by one non-resident was more than $2,000, exclusive of interest and costs. As the court had jurisdiction of the subject-matter the parties could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper. But if there was any irreg-

ularity in docketing the case or in the order of the pleadings such an irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause.

The Fourth question certified to us by the Circuit Court of Appeals is answered in the affirmative.